Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 2001

DON RAY PHINNEY,

Petitioner,

v.

FIRST AMERICAN NATIONAL BANK, et al.,

Respondent.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Don Ray Phinney, Petitioner
Pro se
4815 Elderberry Avenue
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November 12, 2001

5699

QUESTION(S) PRESENTED FOR REVIEW

1. Whether absolute immunity for Judicial Acts taken in a Judicial capacity covers acts outside the duties of a Judge in direct violation of the Canons of Judicial Conduct as stated in the ABA Code of Judicial Conduct.

2. Whether Judicial Acts in direct violation of the Canons of Judicial Conduct as stated in the ABA Code of Judicial Conduct constitute a violation of Respondent's Due Process Rights guaranteed to him under the Fourteenth Amendment of the U.S. Constitution.

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LIST OF PARTIES

All parties **do not** appear on the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Ninth Circuit is reprinted in the Appendix hereto at Page A-1.

JURISDICTION

The date on which the United States Court of Appeals decided Petitioner's case was on May 29, 2001. Petition for Rehearing was denied on August 14, 2001. The Supreme Court jurisdiction is invoked under 28 U.S.C. § 1254(1).

This petition was filed within (90) days of the petition for rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment of the Constitution of the United States:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside ... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States ... nor deny to any person within its jurisdiction the equal protection of the laws.

No state ... shall deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

On June 24, 1999, Petitioner timely filed a **RICO** complaint in the United States District Court for the Central District of California, Case No. **99-06421**, (Judge Feess), for RICO violations of **Bribery**, Obstruction of Justice and Mail Fraud that occurred on **April 2, 1996**, by a Tennessee Bank and several of its employees, (Respondents), and continued through **January 26, 1998** by the illegal switching of Petitioner's case with another case with the same number, preventing the Supreme Court of the United States from reviewing Petitioner's case, No. **97-1222**. Petitioner obtained a copy of the case that the Justices actually reviewed, in place of and instead of Petitioner's case, from this Court's Librarian.

On November 9, 1999, the district trial court (Judge Feess) rules "The Complaint as filed failed to plead a RICO violation with particularity, and that the complaint was deficient in pleading any of the elements of a RICO claim." Petitioner's counsel was given until December 8, 1999 to file a First Amended Complaint. The trial court (Judge Feess) admonished Petitioner's

counsel regarding his obligations under Rule 11, Fed. R. Civ. P. The Court (Judge Feess) and Petitioner's attorney withdrew from Petitioner's case immediately.

On December 8, 1999, Petitioner timely filed a First Amended Complaint.

On February 8, 2000, the Court (Judge Cooper) dismissed Petitioner's complaint "in its entirety with prejudice."

Petitioner did not file a **motion for reconsideration** because the district trial court (Judge Cooper) did not mail Petitioner a copy of the February 8, 2000 trial court order (Judge Cooper) dismissing the case. Instead, Petitioner learned from Respondent's attorney, O. Andrew Wheaton, after time had passed to file a response, in a correspondence letter, that the trial court's (Judge Cooper) ruling for dismissal existed. Petitioner immediately requested a copy of the district court's Order, and the District Court's proof of service, from Respondent's counsel, who immediately, via facsimile and U.S. mail, sent a copy with a cover letter to Petitioner stating: "Further to our conversation today, I am enclosing herewith the following orders:

a. Order Granting Defendants' Motion to Dismiss; and

b. Order to Show Cause.

I was not provided with a proof of service from the District Court."

Petitioner received the district court's Orders from Respondent's counsel and immediately contacted the district trial court (Judge Cooper). Judge Cooper's Deputy Clerk (Alicia Mason) immediately contacted Petitioner and stated that she was unaware that Petitioner had not received a copy of the district trial court's Order of February 8, 2000 because the trial court (Judge Cooper) had lost Petitioner's address.

Petitioner filed for an extension of time to file a motion for reconsideration but the district trial court (Judge Cooper) ruled that Petitioner's due process rights were not harmed in any way because the Court had lost Petitioner's address.

Petitioner timely appealed the trial court's (Judge Cooper) dismissal with prejudice of his RICO claims and the trial court's (Judge Cooper) Order Adjudging Plaintiff to be a Vexatious Litigant.

On May 29, 2001, the United States Court of Appeals for the Ninth Circuit affirmed the district trial

court's (Judge Cooper) Orders, Appeal Case numbers **00-55661** and **00-55837**, respectively.

On July 12, 2001, Petitioner timely filed a Petition for Rehearing.

On August 14, 2001, the United States Court of Appeal denied Petitioner's Petition for Rehearing.

REASONS FOR GRANTING THE PETITION

Petitioner submits, it is clear that the Ninth Circuit Court of Appeals abused its discretion claiming: "The district court properly dismissed Phinney's claims against Judge Echols and Wiseman based on their absolute immunity for acts taken in a judicial capacity. See Moore v. Brewster, 96 F.3d 1240, 1243-44 (9th Cir. 1996); Atkinson-Baker & Assoc., Inc., v. Kelts, 7 F.3d 1452, 1454-55 (9th Cir. 1993) (per curiam)."

It is submitted that "acts taken in a judicial capacity" do not include owning stocks with a Respondent at the time of trial, having loans with a Respondent at the time of trial, being counsel for a Respondent until three months and nine days before trial and not disclosing these facts before trial (Judge Wiseman), or forget to mention on the record at the

beginning of a Petitioner's case that you have four accounts currently with the Respondent, two accounts held by your **wife** and two accounts held by your **mother-in-law** (Judge Echols). Clearly here, the facts show instances of bribery and judicial impropriety in which case there is no protection or immunity available.

Although not relevant in this Appeal, but indicative of the court's propensity to abuse its discretion and the fact that it is part of the ruling of the Ninth Circuit Court of Appeals, however, the district trial court (Judge Wiseman) was involved in the fraud of preventing the Petitioner's jury to hear the $50 million contract value from Petitioner's expert witness at trial and the cancellation, by **JNOV,** of Petitioner's $1.25 million unanimous jury judgment verdict which **FOUND** that the Respondent committed **fraud, forgery and perjury** against Petitioner., but these corrupt acts occurred on October 24, 1978, and clearly can only be used for history background for the facts of Petitioner's previous case, Civil Action File No. **74-298-NA-CV**, and cannot be used as a reason to deny Petitioner's claims against First American National Bank and its employees, for corrupt acts that they committed on April 2, 1996 through January 26, 1998. Agency Holding Corp. v. Malley-Duff

&Assocs., 107 S.Ct., 2759, 2767 (1987) As such, in order for the doctrine of res judicata to bar a claim, the claim must have been litigated and decided at an earlier time, which is not the case here, because Petitioner's claims have never been litigated nor decided on the merits which precludes the doctrine of Res Judicata. The trial court (Judge Echols), on April 2, 1996, erroneously ruled that the trial court (Judge Davies) on August 6, 1993, ruled that Petitioner's August 12, 1992 complaint was time-barred, and trial court (Judge Cooper) on February 8, 2000 confirmed the erroneous trial court (Judge Echols) April 2, 1996, ruling, with reference to Petitioner's timely filed August 12, 1992 complaint. Further, here the trial court (Judge Cooper) completely disregards the trial court (Judge Davies) ruling granting Petitioner's Motion for Reconsideration timely filed by Petitioner's attorney Melvin M. Belli, regarding Petitioner's statute of limitations issue with reference to the timely filed August `12, 1992, complaint, completely contrary to the August 6, 1993 trial court (Judge Davies) ruling.

In addition, the trial court (Judge Cooper), in demonstrating its abuse of discretion, doesn't even mention the trial court (Judge Davies) August 6, 1993 ruling granting Petitioner's Motion for Reconsideration

regarding the statute of limitations issue, anywhere, in her ruling of February 8, 2000, destroying Petitioner's right to a fair hearing, due process, needed discovery, or a trial date.

Most importantly here, Respondent filed for summary judgment on August 31, 1994 and began to mail all motions to Petitioner to the wrong address causing the trial court (Judge Echols) to rule on motions, filed by Respondents, before the Petitioner received a copy of the motions that were being ruled on.

The effect of using the wrong zip code on Petitioner's mail, by the Respondent, caused the trial court (Judge Echols) to rule "Presently pending before the Court is Defendants' motion for summary judgement, to which Plaintiff has failed to respond." However, the trial court (Judge Echols) denied Petitioner's motion to **stop** the Respondent from using the wrong zip code with **regular mail postage** causing Petitioner not to receive a copy of Respondent's motions. The trial court (Judge Echols) denied these motions when Petitioner **needed to respond** to Respondent's important motions **but could not respond** because the trial court (Judge Echols) denied Petitioner's motions to force Respondent to use the correct zip code regarding Petitioner's mail. Instead,

Respondent began to send Petitioner's mail, not only to three different wrong zip codes, but to the wrong city. As such, clearly indicative of the lower court's abuse of discretion because the trial court (Judge Echols) allowed it to continue..

As such, the Court of Appeals ruling stating "Phinney's claims against the other defendants are barred by the doctrine of res judicata", is clearly contrary to the rule of law. In addition, the shield of immunity does not include murder, robbing a bank or **taking a bribe from a bank, as in the instant case**.

Here, the facts show instances of bribery and judicial impropriety, in which case there is no protection or immunity available.

Petitioner, based on known facts and personal knowledge, contends that the Court of Appeals Memorandum affirming the trial court's (Judge Cooper) dismissal with prejudice of Petitioner's RICO claims, is based on a misapprehension of the facts in the case. As such, Nordhorn v. Ladish Co., Inc., 9 F.3d 1402, 1404 (9th Cir. 1993) does not apply to the instant case.

The Appeals Court also affirmed the trial court's (Judge Cooper) ruling that Petitioner is a vexatious litigant, however, it is clear that this case began with the

corrupt trial court Order (Judge Echols) on April 2, 1996 claiming that in ... "the most recent ruling" ... allowing the Tennessee district court (Judge Haynes) on April 7, 2000, to impose massive sanctions of $43,403.50 against Petitioner after the trial court (Judge Wiseman) would not allow the jury to hear Petitioner's expert testimony stating Petitioner's contract loss which is, "...in the range of 50 or 100 million.", and cancelled the $1.25 million jury judgment verdict.

The trial court (Judge Davies) ruled that the statute of limitations was deemed tolled by the filing of the Petitioner's complaint that was timely filed on August 12, 1992. Therefore, Petitioner had one year to refile, which was timely filed on August 3, 1994. As such, the April 2, 1996 trial court (Judge Echols) ruling is, contrary to the trial court (Judge Davies) ruling, which is an illegal act, which is the main RICO issue here because the Court of Appeals decision is based on an erroneous assumption that Judge Echols acted in accordance with the law and rules of judicial conduct.

It is submitted that judges must not be allowed by this high Court to hide under the shield of immunity when they commit illegal acts.

Further, all is **MOOT** on February 8, 2000, after the trial court (Judge Cooper) did **not properly serve** Petitioner its **Order Granting Defendants' Motion to Dismiss**.

Therefore, when a **Court of Appeals** and a **Trial Court** both abuse its power, allowing a Respondent to use the judicial system for corrupt means instead of judicial means, a Petitioner has the due process right to seek this highest Court's protection of Petitioner's right to a **fair hearing** guided by the rule of law. Otherwise, all litigants who demand **justice** have been violated and all courts have been violated.

This Court has "judicial discretion" and "compelling reasons" to justify this Court to hear this case because clearly here the court of appeals deviated from "normal appellate practice" and requires "immediate determination in this Court. See 28 U.S.C. §2101(e)." Petitioner submits this case should be settled by this Court because a United States court of appeals has entered a decision in conflict with the decision of a United States district trial court on the same important matter, and under Supreme Court Rule 10(a)(b) and (c), this important federal question "...has not been, but should be, settled by this Court....".

It is submitted that it is clear that the Ninth Circuit court of appeals abused its discretion in allowing the trial court (Judge Cooper) to deny Petitioner's due process rights because the trial court (Judge Cooper) did not lose Petitioner's address. Most importantly, even if the trial court (Judge Cooper) did lose Petitioner's address, the reason is **moot**, because Petitioner was **not properly served** by the trial court (Judge Cooper), not only making it clear that all of the district trial court business after February 8, 2000 is **MOOT**, but making it clear that the Ninth Circuit court of appeals abused its discretion for allowing the trial court (Judge Cooper) to violate Petitioner's proper service and due process rights, including a **fair hearing**, causing fundamental rights afforded to **all under our system of jurisprudence to be violated**.

In order to state a cause of action for violation of RICO, it must be alleged that the Defendants, through the commission of two or more timely acts (i.e., within 10 years, constituting a "pattern of racketeering activity, directly or indirectly invests in, maintains an interest in, or participates in an enterprise, the activities of which affect interstate commerce by reason of which the Plaintiff was injured in his business or property. C&W

Construction Company v. Brotherhood of Carpenters and Joiners of America, 687 F. Supp. 1453, 1465 (D. Hawaii ' 1988) citing Sun-Land Nurseries, Inc., v. Southern California Dist. Council of Laborers, Etc., 793 F.2d 1110, 1115 (9th Cir. 1986).

ABA Model Code of Judicial Conduct (1990)

Preamble

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

CANON I: A Judge shall uphold the Integrity and Independence of the Judiciary

A. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe

those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this code are to be construed and applied to further that objective.

CANON 2: A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities

B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

Clearly, violations of these ethics are outside the bounds of what the courts should view as protected judicial acts within a judge's judicial capacity.

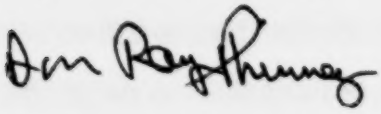
Also equally as evident should be the evidence of such acts, if proven true, should be a question for the trier of fact (be it judge or jury) as to the question of "IF" such acts, as proven, do equate to acts that are, in fact, protected absolutely within a judge's judicial capacity. Or if such acts fall outside the accepted legal bounds of

what is required by our Constitution and by our society in effecting justice within our legal system.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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November 12, 2001

App. A

Filed May 29, 2001

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DON RAY PHINNEY, an Individual,	)	No. 00-55661
Plaintiff-Appellant,	)	D.C. No. CT-99-06421-FMC
v.	)	MEMORANDUM*
FIRST AMERICAN NATIONAL BANK; et. al.,	)	
Defendants-Apellees.	)	

Appeal from the United States District Court
for the Central District of California,
Florence Marie Cooper, District Judge, Presiding

Submitted May 14, 2001**

Before: PREGERSON, FERNANDEZ, and

WARDLAW, Circuit Judges

Don Ray Phinney appeals the district court's

dismissal with prejudice of his RICO claims. The district court properly dismissed Phinney's claims against Judges Echols and Wiseman based on their absolute immunity for acts taken in a judicial capacity. *See Moore v. Brewster*, 96 F.3d 1240, 1243-44 (9th Cir. 1996); *Atkinson-Baker & Assoc., Inc. v. Kolts*, 7 F.3d 1452, 1454-55 (9th Cir. 1993) (per curiam). Phinney's claims against the other defendants are barred by the doctrine of res judicata. Therefore, dismissal was warranted as to them as well. *See Nordhorn v. Ladish Co., Inc.*, 9 F.3d 1402, 1404 (9th Cir. 1993).

Phinney also appeals the entry of a vexatious litigant order against him. The district court did not abuse its discretion in entering this order. *See DeLong v. Hennessey*, 912 F.2d 1144, 1147-48 (9th Cir. 1990).

AFFIRMED

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P.34(a)(2).

App. B

Filed August 14, 2001

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DON RAY PHINNEY, an Individual,	)	
	)	No. 00-55661
	)	00-55837
Plaintiff-Appellant,	)	
	)	DC# CV-99-06421-FMC
v.	)	Central California
	)	(Los Angeles)
FIRST AMERICAN NATIONAL BANK; et. al.,	)	
	)	ORDER
	)	
Defendants-Apellees.	)	
	)	

Before: PREGERSON, FERNANDEZ, and

WARDLAW, Circuit Judges

Appellant's petition for panel rehearing is denied.

No further filings will be accepted in this closed appeal.

App. C

Filed February 8, 2000

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

DON RAY PHINNEY,	)	CV 99-6421 FMC (Rcx)
	)	
Plaintiff,	)	
	)	Order Granting Defendants'
vs.	)	Motion to Dismiss
	)	
FIRST AMERICAN	)	
NATIONAL BANK, et al.	)	
	)	
Defendants.	)	

I. Introduction

On December 8, 1999, plaintiff filed an amended complaint alleging that defendants violated 18 U.S.C. § 1962. All defendants moved to dismiss plaintiff's amended complaint for failure to state a claim under Federal Rule of Civil Procedure (12(b)(6). Several also moved to dismiss for lack of jurisdiction and, or, improper venue pursuant to Rule 12(b)(2) and 12(b)(3) respectively. After considering the moving and responding papers and the argument presented at the hearing on January 31, 2000, the Court issues the

following decision:

II. Factual Background

Plaintiff's amended complaint alleges the following facts:

Between 1964 and 1966, plaintiff worked on his music career in Nashville, Tennessee. During this time, plaintiff cashed personal checks at First American National Bank. In 1996, as a result of some confusion over whether his father wired money or deposited it in an account, plaintiff discovered that seven checks would be returned to the bank for insufficient payment. Because plaintiff was preparing to leave for California, the bank manager, defendant Edgar Jones, told him to sign a note for the amount remaining on the checks and to pay the note upon his return. Plaintiff signed the note and gave it to defendant Melvin Hussung, the bank teller, before traveling to California.

In January 1967, plaintiff signed a recording contract with RCA and a management contract with defendant Raymond Katz. In July 1967, plaintiff was charged with

passing bad checks. Apparently as a result of the criminal charges, Katz resigned as plaintiff's manager and refused to enter a new contract. Instead, Katz went into business with defendants Sandy Gallin, Jim Morey and First American National Bank.

In January 1968, plaintiff was convicted. His conviction was overturned on appeal.

In December 1971, plaintiff sued First American National Bank for malicious prosecution in federal court. The case was transferred from California to Tennessee. The Honorable Thomas A. Wiseman, Jr., presided over the trial in 1978. The jury awarded plaintiff $1.25 million dollars. Judge Wiseman granted defendant's motion for judgment notwithstanding the verdict in June of 1979. Plaintiff states that Judge Wiseman held stock in First American National Bank at the time of the trial and had received a loan from the Bank. According to a Sixth Circuit Order dated March 12, 1984, Judge Wiseman disclosed before trial that he had represented and been a customer of First National Bank which

had been acquired by First American Corporation. Neither party objected to Judge Wiseman continuing as trial judge. Plaintiff also states that he witnessed the attorney for First American, defendant Robert Walker, bribe his attorney, defendant Gareth Aden, with a million dollars during trial.

Plaintiff appealed Judge Wiseman's judgment notwithstanding the verdict. The Sixth Circuit affirmed the District Court. The Sixth Circuit Executive, defendant James Higgins engaged in an unspecified form of impropriety with respect to the appeal. In 1984, Plaintiff's petition for a writ of certiorari to the United States Supreme Court was denied. Plaintiff states that his petition was denied because the Court clerk, defendant Kathy Tyrcz, prevented the Supreme Court Justices from reading his petition by switching it with that in another case. She allegedly took this action to cover up the wrongdoing of Judge Wiseman and Circuit Executive Higgins.

Plaintiff next filed a complaint against Judge Wiseman with the Judicial Council of the Sixth Circuit. He

alleges that his complaint was dismissed because Higgins covered up evidence of Judge Wiseman's improper interest in the Bank.

In 1991, plaintiff filed a RICO action in this Court. The Honorable John Davies dismissed the case for failure to effect timely service of process. Plaintiff filed a RICO claim again in 1992. Judge Davies dismissed the case for lack of personal jurisdiction over First American National Bank, First American Corporation. In 1994, plaintiff then filed the RICO action in the United States District Court for the Middle District of Tennessee. Magistrate Julliet Griffin was assigned as magistrate judge in the case. Griffin served as Judge Wiseman's law clerk while plaintiff's criminal case was before the Judge. In 1996, the RICO action was dismissed by the Honorable Robert Echols. Plaintiff states that Judge Echols erroneously interpreted Judge Davies' ruling on the statute of limitations in dismissing the action. In 1997, circuit executive Higgins had plaintiff's appeal denied in the RICO case by means of "fraud and obstruction" in order to cover up

the earlier misconduct in the civil malicious prosecution case. Similarly, Supreme Court clerk Tyrcz presented the Supreme Court Justices from reading plaintiff's petition for writ for certiorari to cover up the previous misconduct.

In 1998, Katz admitted that defendants Morey, Gallin and First American National Bank had been conspiring since 1966 to deprive plaintiff of his singing career. Armed with this evidence, plaintiff filed a second RICO action in this Court in 1999. The Honorable Gary Feess dismissed plaintiff's complaint for failure to state a claim for relief and granted leave to amend. Judge Feess cautioned that plaintiff would have only one opportunity to amend his complaint. Plaintiff filed an amended complaint on December 8, 1999.

III. Judicial Immunity

Plaintiff's complaint alleges that the Honorable Thomas A. Wiseman, Jr., District Judge for the District of Tennessee, "wrongfully canceled" plaintiff's $1.25 million verdict by granting a judgment notwithstanding the verdict for First American National Bank in 1979. Plaintiff also alleges

that Judge Wiseman misrepresented his financial interest in the Bank to support his decision.

Plaintiff alleges that the Honorable Robert L. Echols, District Judge for the District of Tennessee, "lied" when he dismissed plaintiff's RICO action in 1996 when he stated that Judge Davies had held that the action was barred by the statute of limitations.

Judges are absolutely immune from civil liability for all actions taken within their judicial capacity. *See Mireles v. Waco,* 502 U.S. 9, 9-10, 112 S.Ct. 116 L. Ed. 2d 9 (1991) (per curiam) (judicial acts immune from claims for damages); *Moor v. Brewster*, 96 F.3d 1240, 1243 (9th Cir. 1996) (judicial acts immune from claims for equitable relief). Accordingly, Judges Wiseman and Echols will not be deprived of immunity even if their actions were in error, were done maliciously or were in excess of their authority. *See Mullis v. United States Bankruptcy Court*, 828 F. 2d. 1385, 1388, (9th Cir. 1987). Judicial immunity protects "judicial independence by insulating judges from vexatious actions prosecuted by

disgruntled litigants." *See Forrester v. White*, 484 U.S. 219, 225, 108 S.Ct. 538, 98 L. Ed. 2d. 555 (1988).

According to the facts alleged in plaintiff's complaint, both judicial officers were acting in the scope of their judicial capacity when they issued the rulings plaintiff claims were "wrongly" decided. Because Judges Wiseman and Echols are immune from suit for actions taken in their judicial capacity, plaintiff's action against them is dismissed with prejudice.

IV. Failure to State a Claim

Defendants First American National Bank, First American Corporation, Robert Walker, Raymond Katz, Sandy Galling, Jim Morey, moved to dismiss plaintiff's claim for failure to state a claim under Federal Rule 12(b)(6). Although defendants James Higgins, Kathy Tyrcz and Gareth Aden did not address the failure to state a claim as a specific ground for dismissal, the resolution reached by the Court on this issue is applicable to all defendants.[1] Among the ample rationales

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[1] Several defendants raise personal jurisdictional issues in support of their motions to dismiss. The Court concludes that res judicata requires dismissal of the action. In

supporting their motions to dismiss for failing to state a claim, defendants argue that the doctrine of res judicata prevents plaintiff from relitigating the RICO claim that Judge Echols held was barred by the statute of limitations.

A. Standard

A federal action may be barred by the doctrine of res judicata where an earlier action involved the same claim, reached final judgment on the merits and involved the same parties. *See Nordhorn v. Ladish, Co., Inc.*, 9 F. 3d 1402, 1404 (9th Cir. 1993). For res judicata purposes, a dismissal on statute of limitations grounds is treated as a dismissal on the merits. *See In re Marino*, 181 F. 3d 1142, 1144 (9th Cir. 1999). Finally, this Court observes the Supreme Court's admonition that res judicata is not a mere matter of practice or procedure; it is a rule of fundamental and substantial justice which should be enforced by the courts. *See Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 101

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the interest of economy, the Court does not address the additional basis for dismissal raised by the parties.

S.Ct. 2424, 69 L. Ed. 2d 103 (1981).

B. Analysis

In 1984, Judge Echols held that plaintiff's RICO claim was barred by the statute's four year statute of limitations. See Memorandum No. 3-94-639 at 7, citing *Agency Holding Corporation v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 156 (1987). Judge Echols explained that, at the latest, plaintiff had constructive knowledge of the facts underlying his complaint prior to August 1987 when he filed his complaint with the Sixth Circuit Judicial Council. In addition, Judge Echols noted that, although one of plaintiff's claims arises out of the 1987 Judicial Council proceedings, "it is clear from the complaint that Plaintiff was aware of this claim, at the latest by May 12, 1989. Thus, construing the fact in the light most favorable to Plaintiff, the latest date that the RICO limitations period could have begun to run is in 1989. As Plaintiff filed this complaint on August 3, 1994, over four years later, Plaintiff's claims are clearly barred by the applicable statute of limitations." Memorandum No. 3-94-639 at 8 (footnote

omitted).

Contrary to plaintiff's allegations, it is clear from the memorandum opinion that Judge Echols independently and thoroughly analyzed the statute of limitations as it applied to the facts alleged in plaintiff's complaint. Accordingly, plaintiff cannot maintain a new cause of action based on the same claim, involving the same parties that Judge Echols dismissed. *See Nordhorn,* 9 F. 3d at 1404.

Plaintiff argues that he has complied with the statute of limitations because he did not learn of the predicate acts taken by defendants Morey and Gallin until 1998 when Katz admitted the entire conspiracy to him. In addition, Plaintiff argues that he did not know of Judge Echol's involvement in the conspiracy until he dismissed plaintiff's case in 1996.

Plaintiff's complaint alleges the following:

"[d]efendants joined together with themselves and with the presiding judge, Thomas A. Wiseman, Jr., ... to form an enterprise ... that is, a group of individuals, associated in fact ... The purpose of the enterprise was to deprive Plaintiff of a fair and just trial and a jury award of $1.25 million, to cover-up the value of the KATZ contract from the jury to prevent a 50 million dollar judgment award, to grant a JNOV, and to unjustly enrich themselves and the presiding judge..."

Compl. para 80. Notwithstanding the additional evidence plaintiff has gathered about individual defendants, he does not dispute that he was aware of the alleged conspiracy prior to 1989, the date Judge Echols relied on in determining the expiration of the statute of limitations. Accordingly, Judge Echols' ruling is an effective bar to plaintiff's amended complaint. The claims presented in the 1994 RICO action were not revived by the mere addition of Judge Echols as a defendant[2] and additional allegations of wrongdoing against particular defendants.

It is clear that plaintiff believes he has been wronged by the actions of defendants. Nonetheless, the time period for a legal remedy has expired. New evidence surrounding the same events will not cure this defect. The doctrine of res judicata bars plaintiff's complaint based on all factual allegations surrounding the alleged three decade conspiracy to ruin his music career.

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[2] As explained above, Judge Echols is immune from suit for his judicial acts.

V. Vexatious Litigant

Defendants First American National Bank, First American Corporation, Aden, Morey and Gallin requested that the Court find plaintiff to be a vexatious litigant pursuant to Local Rule 27A. The Court denies the defendants request for costs in this suit and addresses the issue of whether plaintiff should be found to be a vexatious litigant in a separately issued Order to Show Cause.

VI. Conclusion

Defendants' motions to dismiss are granted. Plaintiff's complaint is dismissed in its entirety with prejudice.

IT IS SO ORDERED

February 8, 2000

Florence-Marie Cooper, Judge
United States District Court

App. D

Filed March 10, 2000

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DON RAY PHINNEY, an individual,	)	
	)	CV 99-6421 FMC (RCx)
Plaintiff,	)	
	)	
v.	)	
	)	Order Adjudging Plaintiff To Be A Vexatious Litigant; Directive to the Clerk of of Court
FIRST AMERICAN NATIONAL BANK, et al.,	)	
	)	
Defendants.	)	

I. Introduction

On February 8, 2000, this Court issued an Order to Show Cause as to why plaintiff should not be determined to be a vexatious litigant under Local Rule 27A. Plaintiff filed a timely response.[1]

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[1] Plaintiff states in his response that he did not receive a copy of the Court's February 8, 2000, order. Plaintiff states that he received a copy of the order from defendants on February 17, 2000. Plaintiff does not allege

II. Standard

"It is the policy of the Court to discourage vexatious litigation and to provide persons who are subjected to vexatious litigation with security against the costs of defending against such litigation and appropriate orders to control such litigation. It is the intent of this rule to augment the inherent power of the Court to control vexatious litigation and nothing in this rule shall be construed to limit the Court's inherent power in that regard." Local Rule 27A. In addition, a district court may enjoin a vexatious litigant by issuing an order requiring the litigant to seek permission from the court prior to filing any future suits under 28 U.S.C. §1651(a), the All Writs Act. It is clear that this Court has the authority to enjoin litigants with abusive and lengthy histories. *See DeLong v. Mansfield*, 912 F.2d 1144, 1447 (9th Cir. 1990).

However, because pre-filing orders limit an individual's access to the courts, the Court approaches such

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that he suffered prejudice as a result of the delay in receiving the Court's orders. The Court's file contains a verification of service for both orders issued February 8, 2000.

orders with caution. *See id.*, at 1149. Accordingly, before entering a pre-filing order, (1) the plaintiff must be given notice and opportunity to oppose the order; (2) the Court must make an adequate record of plaintiff's abusive or numerous filings; (3) the Court must make substantive findings of the frivolous or harassing nature of the filings; and (4) the order must be narrowly tailored to curb the abuses of the particular litigant. *See id.*, at 1147-48.

III. Analysis

A. Notice

This Court issued an Order to Show Cause to which plaintiff provided a response. Although plaintiff states that he did not receive the Court's February 8, 2000, order until February 17, 2000, he did not seek an extension of time or allege prejudice from the delay. The Court finds based on plaintiff's response, that plaintiff had actual notice and has exercised his opportunity to oppose and be heard on this matter.

B. Plaintiff's Numerous Filings

A pre-filing order is necessary in this case in light of plaintiff's numerous filings based on the same set of alleged

facts. Plaintiff has filed the same RICO action four times between 1991 and 1999. On each occasion, plaintiff's complaint has alleged substantially the same facts and named the same defendants with the exception of the most recent lawsuit which added the Federal Judge who dismissed his earlier RICO action. The facts alleged describe the following three-decade conspiracy:

Between 1964 and 1966, plaintiff worked on his music career in Nashville, Tennessee. During this time, plaintiff cashed personal checks at First American National Bank. In 1966, as a result of some confusion over whether his father wired money or deposited it in an account, plaintiff discovered that seven checks would be returned to the bank for insufficient payment. Because plaintiff was preparing to leave for California, the bank manager, defense Edgar Jones, told him to sign a note for the amount remaining on the checks and to pay the note upon his return. Plaintiff signed the note and gave it to defendant Melvin Hussung, the bank teller, before traveling to California.

In January 1967, plaintiff signed a recording contract with RCA and a management contract with defendant Raymond Katz. In July 1967, plaintiff was charged with passing bad checks. Apparently as a result of the criminal charges, Katz resigned as plaintiff's manager and refused to enter a new contract. Instead, Katz went into business with defendants Sandy Gallin, Jim Morey and First American National Bank.

In January 1968, plaintiff was convicted. His conviction was overturned on appeal because he had been convicted on a repealed statute.

In December 1971, plaintiff sued First American National Bank for malicious prosecution in federal court. The case was transferred from California to Tennessee. The Honorable Thomas A. Wiseman, Jr., presided over the trial in 1978. The jury awarded plaintiff $1.25 million dollars. Judge Wiseman granted defendant's motion for judgment notwithstanding the verdict in June of 1979. Plaintiff states that Judge Wiseman held stock in First American National Bank at the time of the trial and had received a loan from the Bank. According to Sixth Circuit Order dated March 12, 1984, Judge Wiseman disclosed before trial that he had

represented and been a customer of First National Bank which had been acquired by First American Corporation. Neither party objected to Judge Wiseman continuing as trial judge. Plaintiff also states that he witnessed the attorney for First American, defendant Robert Walker, bribe his attorney, defendant Gareth Aden, with a million dollars during trial.

Plaintiff appealed Judge Wiseman's judgment notwithstanding the verdict. The Sixth Circuit affirmed the District Court. The Sixth Circuit Executive, defendant James Higgins, engaged in an unspecified form of impropriety with respect to the appeal. In 1984, Plaintiff's petition for a writ of certiorari to the United States Supreme Court was denied. Plaintiff states that his petition was denied because the Court clerk, defendant Kathy Tyrcz, prevented the Supreme Court Justices from reading his petition by switching it with that in another case. She allegedly took his action to cover up the wrongdoing of Judge Wiseman and Circuit Executive Higgins. Plaintiff next filed a complaint against Judge Wiseman with the Judicial Council of the Sixth Circuit. He alleges that his complaint was dismissed because Higgins covered up evidence of Judge Wiseman's improper interest in the Bank.

In 1991, plaintiff filed a RICO action in this Court. The Honorable John Davies dismissed the case for failure to effect timely service of process. Plaintiff filed a RICO claim again in 1992. Judge Davies dismissed the case for lack of personal jurisdiction over First American National Bank, First American Corporation. In 1994, plaintiff then filed the RICO action in the United States District Court for the Middle District of Tennessee. In 1996, the RICO action was dismissed by the Honorable Robert Echols. In 1997, circuit executive Higgins had plaintiff's appeal denied in the RICO case by means of

"fraud and obstruction" in order to cover up the earlier misconduct in the civil malicious prosecution case. Similarly, Supreme Court clerk Tyrcz prevented the Supreme Court Justices from reading plaintiff's petition for writ for certiorari to cover up the previous misconduct.

Plaintiff filed another RICO action based on the same facts against the same defendants in this Court in 1999. Because Judge Echols ruled that plaintiff's RICO claim was barred by the statute of limitations, this Court held that the doctrine of res judicata barred plaintiff's most recent complaint.

This Court notes that Judge Echols has effectively determined plaintiff to be a vexatious litigant in the Middle District of Tennessee. Judge Echols warned plaintiff that he must seek permission before filing a complaint based on the facts found in the first amended complaint and that sanctions would be imposed on additional frivolous filings. See Memorandum No. 3-94-639. Despite the fact that plaintiff was sufficiently admonished that he does not have a legally cognizable claim based on the facts he has presented, plaintiff filed

the same claim in this Court.

C. Plaintiff's Filings are Harassing to Defendants

Although plaintiff has filed relatively small number of complaints, *cf. In re Green,* 669 F.2d 779, 781 (D.C. Cir. 1981) (over 600 complaints filed), his repeated filings against the same defendants based on the same issues are nonetheless abusive. Defendants have incurred substantial cost in defending an action that, nearly a decade ago was determined to be barred by the statute of limitations. In response to plaintiff's most recent RICO complaint, several defendants sought to have plaintiff adjudged to be a vexatious litigant. *See Motion of First American National Bank and First American Corporation to Dismiss,* dec. of Sonya Sud at 2 (stating that they have incurred $75,000 in attorney fees in defense of this action; seeking order requiring security of $75,000); *Motion of*

Gareth Aden to Dismiss (seeking order requiring security of at least $50,000); *Motion of Jim Morey and Sandy Gallin to Dismiss* (seeking order requiring security of $75,000). Two defendants have filed a motion for sanctions. *See Motion of Jim Morey and Sandy Gallin for Rule 11 Sanctions* (seeking costs of $34,000). Plaintiff ha been put on notice that he does not have a legally cognizable claim against any of the named defendants based on the statute of limitations. His repeated filing of the same action is harassing to defendants as demonstrated by the substantial costs incurred by these defendants.

The Court finds that plaintiff has abused the Court's process by filing subsequent complaints against the same defendants after clear explanation from the Court that this action is time-barred. The Court further finds that plaintiff is likely to continue such abuse unless protective measures are taken. See Local Rule 27A.3.

D. Scope of the Court's Order

Orders which restrict a party's ability to file with the Court "must be narrowly tailored to closely fit the

specific vice encountered." *DeLong*, 912 F.2d at 1148. The purpose of the order is to relieve defendants from the burden of defending themselves against claims that have been litigated, and, at the same time, preserve plaintiff's "right to access the court should he bring forth a nonfrivolous claim." *See Johns v. Town of Los Gatos*, 834 F.Supp. 1230, 1232 (N.D. Cal. 1993). Accordingly, the order is aimed only at future filings based on the facts and circumstances of plaintiff's previous complaints against these defendants.

IV. Conclusion

This Court finds plaintiff to be a vexatious litigant based on the evidence described above.

Plaintiff is hereby ordered to seek leave of the Court before filing a complaint against any of the defendants named in this action based on any or all of the facts alleged in this complaint, including but not limited to the alleged three-decade conspiracy to destroy plaintiff's music career. Plaintiff must certify that the claims he wishes to present are brought in good faith and were not raised in his previous filings. Plaintiff must also

post security in the amount of $50,000 before filing such a complaint.

The Clerk of the Court is directed to reject plaintiff's filings absent compliance with the requirements of this order.

IT IS SO ORDERED

March 10, 2000

Florence-Marie Cooper, Judge
United States District Court

App. E

Filed August 6, 1993

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DON RAY PHINNEY, an individual, Plaintiff, v. FIRST AMERICAN NATIONAL BANK; FIRST AMERICAN CORP. (TENN); AND DOES 1-100, inclusive, Defendants.	CASE NO. CV 92-4823 JGD ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR RECONSIDERATION

On May 11, 1993, Plaintiff filed a Motion for Reconsideration of the Court's prior Order to Dismiss the Complaint Under Federal Rules of Civil Procedure 12(B)(2), 12(B)(3) and 12(B)(6). After review of the parties' written

submissions, the Court HEREBY GRANTS IN PAT AND DENIES IN PART Plaintiff's Motion for Reconsideration. The Motion is DENIED, except that the Order is HEREBY AMENDED TO show (1) that the complaint is not time-barred on its face and (2) that the dismissal is without prejudice.

Facts

On August 12, 1992, Plaintiff Don Ray Phinney ("Phinney") filed a complaint against Defendants First American National Bank ("Bank") and First American Corporation (Tennessee) ("Corporation") for violations of RICO, 18 U.S.C. 1962-67. The Corporation owns the Bank. Phinney, who was pro se until the present motion, now has an attorney. Phinney filed this motion for reconsideration on May 11, 1993.

Phinney's complaint alleges the following facts. In 1968, Phinney lived in Nashville, hoping to become a music star. Phinney dealt with a branch of the Bank. Due to a mixup, Phinney bounced some checks. The Bank decided to prosecute even though Phinney had signed a promissory note for the balance owed on the checks before the checks bounced. Phinney was arrested in California while recording an album

and extradited to Tennessee for trial. Phinney's arrest destroyed several career-making opportunities. Phinney was convicted, but his conviction was later overturned.

Phinney sued the Bank in federal district court in Tennessee. The Bank bribed the judge. Thus, although the jury returned a verdict in Phinney's favor, the judge granted a judgment n.o.v. Furthermore, the Bank submitted false documents to the Sixth Circuit, resulting in an affirmance of the trial court's decision. Phinney also alleges that the Bank has done other illegal acts to hinder his appeals, and that the Judge in his Sixth Circuit action lied about his connections with the bank.

Phinney alleges that late in 1988, he received new FBI evidence that prompted him to bring a suit against the Bank. On August 12, 1991, Phinney filed a suit in this Court. On June 8, 1992, the Court dismissed Phinney's suit without prejudice for failure to effect timely service of the summons and complaint.

On August 12, 1992, Phinney filed this suit. Phinney's suit was assigned to Judge Tevrizian. On September 24, 1992, Phinney's suit was reassigned to this Court. On September 21,

1992, Defendants filed a motion to dismiss under 12(b)(2), 12(b)(3) and 12(b)(6). On October 16, 1992, the parties wrote a stipulation extending Phinney's time to answer the motion while he looked for a lawyer. On November 2, 1992, pro se, Phinney made a very short (6-page) opposition to this motion. The opposition cited just one case in support of Phinney's arguments. On December 22, 1992, this Court entered an Order granting Defendants' motion to dismiss ("Order") for the following reasons:

(a) the Court lacks personal jurisdiction over the Defendant First American Corporation;

(b) venue is improperly laid in the Central District;

(c) Phinney's claims are time-barred; and

(d) Phinney's RICO claims are improperly pled.

Discussion

Phinney has presented no new evidence or arguments which lead the Court to reconsider its findings as to personal jurisdiction, venue, or improper pleading. However, Phinney did alert the Court to facts showing that the complaint is not time-barred on its face.

The statute of limitations for civil RICO claims is four years. Agency Holding Corp. v. Malley-Duff & Assoc., 107 S.Ct. 2759, 2767 (1987). A RICO cause of action accrues when the plaintiff has actual or constructive notice of the injury which is the basis for his action, unless the statute is tolled. Beneficial Standard Life Insurance Co. v. Madariaga, 851 F.2d 271, 274-75 (9th Cir. 1988). "[T]he plaintiff is deemed to have had constructive knowledge if it had enough information to warrant an investigation which, if reasonably diligent, would have led to the discovery of the fraud." Id. at 275.

The complaint was filed August 12, 1992. The Court found in its order that Phinney's claim was time-barred because although the statute of limitations for civil RICO claims is four years, Phinney first learned of the fraud on August 12, 1987, exactly five years before filing his complaint.

Phinney states in his complaint that he "first learned of the pattern of racketeering activity and the injuries [he] sustained therefrom after August 12, 1987." Complaint at 11:12-14. August 12, 1987 is the date of the Order of the

Sixth Circuit Judicial Council ("Council's Order"), which Phinney learned about "thereafter." Complaint at 9:23-25. Phinney does not state exactly when he learned of the contents of the Council's Order. Phinney also does not state exactly when after August 12, 1987 he learned of the pattern of racketeering activity and the injuries he sustained, and does not state when he began an investigation. The complaint states that the FBI "late in 1988 provided Phinney with approximately 40 pieces of new evidence relating to the matters in suit." Complaint at 10:10-11. If Phinney learned of the fraud then, it would be within four years of filing the complaint. Because Phinney's complaint does not in fact state that he first learned of the fraud on August 12, 1987, the complaint is not time-barred on its face.[1]

Conclusion

For the reasons stated above, the Court HEREBY

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[1] In their opposition to the motion for reconsideration, Defendants requested that the Court impose sanctions on Phinney and his attorney for filing the motion. Because Phinney brought relevant facts to the Court's attention, sanctions are not warranted.

GRANTS IN PART and DENIES IN PART Plaintiff's motion for reconsideration. The Motion is DENIED, except that the prior Order to Dismiss the Complaint Under Federal Rules of Civil Procedure 12(b)(2), 12(b)(3), and 12(b)(6) is HEREBY AMENDED to show (1) that the complaint is not time-barred on its fact and (2) that the dismissal is without prejudice.

IT IS SO ORDERED

Dated: August 5, 1993

JOHN G. DAVIES
United States District Judge